

What are Law Clerks for? — Comments on *Nix v. Whiteside*

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About a week before trial on a first-degree murder charge in Iowa, during preparation for direct examination, the accused — Emmanuel Charles Whiteside — told his court-appointed counsel and associate counsel that he would testify to something they were convinced was false. According to his later testimony, counsel advised the accused:

[W]e could not allow him to [testify falsely] because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it; . . . I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that I felt he was committing perjury; also that I probably would be allowed to attempt to impeach that particular testimony.¹

Counsel also informed the accused that he would seek to withdraw from the representation if the accused insisted on committing the perjury. The United States Supreme Court found that the testimony of Whiteside's counsel did not support the view that he threatened "to testify against Whiteside while he was acting as counsel"² but only that "he had admonished Whiteside that if he withdrew he 'probably would be allowed to attempt to impeach that particular testimony,' if Whiteside testified falsely."³

The accused then testified truthfully, was convicted of second-degree murder and sentenced to forty years imprisonment. The accused

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1. *Nix v. Whiteside*, 106 S. Ct. 988, 992 (1986). The testimony was given by counsel at an evidentiary hearing held by the Iowa trial court on the accused's motion for a new trial. *State v. Whiteside*, 272 N.W.2d 468, 470 (Iowa 1978).

2. *Nix*, 106 S. Ct. at 997-98 n.7.

3. *Id.*

then moved for a new trial on the ground, *inter alia*, that he was denied a fair trial because his counsel prevented him from presenting his defense in a proper manner. The trial court held a hearing, heard the testimony of Whiteside, Whiteside's counsel and associate counsel, found the facts to be as testified to by counsel and denied the motion. In 1978 the Iowa Supreme Court upheld the conviction,⁴ finding that "counsel was convinced with good cause [that Whiteside's] proposed testimony would be deliberately untruthful."⁵

In 1981 Whiteside petitioned the District Court for the Southern District of Iowa for a writ of habeas corpus on the ground that he was denied effective assistance of counsel in violation of the sixth amendment to the federal constitution because his counsel had threatened to withdraw, advise the trial judge that his testimony was perjurious, thereby disclosing their confidential discussions, and testify against him as a rebuttal witness for the prosecution. The District Court denied Whiteside's petition.⁶ Whiteside appealed to the Eighth Circuit Court of Appeals which reversed the District Court and ordered it to grant the writ of habeas corpus unless the state began new trial proceedings within a period of time fixed by the district court.⁷ The warden's petition for a rehearing *en banc* was denied.⁸ Four circuit judges dissented from the denial.⁹

The Supreme Court granted certiorari and reversed the Eighth Circuit.¹⁰ Chief Justice Burger delivered the opinion of the Court, in which Justices White, Powell, Rehnquist and O'Connor joined. Justices Brennan, Blackmun and Stevens wrote separate concurring opinions. Justices Brennan, Marshall and Stevens joined in Justice Blackmun's opinion.

All the Justices of the Supreme Court, as well as the Eighth Circuit judges, agreed that *Strickland v. Washington*¹¹ governed the case.¹² *Strickland* set down two standards, both of which the crimi-

4. *State v. Whiteside*, 272 N.W.2d 468 (Iowa 1978).

5. *Id.* at 471.

6. *Whiteside v. Scurr*, No. Civil-81-246-C (S.D. Iowa, Feb. 24, 1982). The case is not reported. No opinion accompanied the order denying the petition for a writ of habeas corpus.

7. *Whiteside v. Scurr*, 744 F.2d 1323 (8th Cir. 1984).

8. *Whiteside v. Scurr*, 750 F.2d 713 (8th Cir. 1984).

9. *Id.* at 714-19.

10. *Nix*, 106 S. Ct. 988 (1986).

11. 466 U.S. 668 (1984).

12. *Strickland v. Washington*, 466 U.S. 668 (1984), had not been decided when the Iowa Supreme Court and the federal district court had the case before them. In the Iowa Supreme Court, Whiteside claimed he had been denied his due process right to a fair trial and not his sixth amendment right to counsel. *Nix*, 106 S. Ct. at 993 n.3. He advanced both the due process and sixth amendment claims in the federal district court which held that he need not be required to make his sixth amendment claim in the state courts because that would be futile. *Id.* The Eighth Circuit agreed with the District Court. *Whiteside v. Scurr*, 744 F.2d at 1326-27.

nal defendant must satisfy to obtain relief by way of habeas corpus on a claim of a deprivation of effective assistance of counsel in violation of the sixth amendment. First, the defendant must show that counsel's conduct fell outside "the wide range of reasonable professional assistance."¹³ Second, counsel's conduct must have prejudiced the defense so as to undermine "confidence in the outcome" of the trial.¹⁴ I shall discuss only the application of the first standard to Whiteside's case.¹⁵

In determining whether the conduct of Whiteside's counsel "fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment,"¹⁶ the Court accepted the *Strickland* position that the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms"¹⁷ and that "[p]revailing norms of practice as reflected in American Bar Association Standards and the like, . . . are guides to determining what is reasonable, but they are only guides."¹⁸ In other words, "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel."¹⁹ The Court eschewed any effort "to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the State's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts."²⁰ "In some future case,"²¹ the Court stated, "we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the State in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that con-

13. *Strickland*, 466 U.S. at 689.

14. *Id.* at 694.

15. The Court held that, as a matter of law, the conduct of his counsel did not prejudice Whiteside because "Whiteside has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury." *Nix*, 106 S. Ct. at 999. Justice Blackmun's concurring opinion was devoted almost entirely to demonstrating that Whiteside failed to prove the kind of prejudice necessary to make out a claim under *Strickland*. Judge Gibson's opinion dissenting from the denial by the Eighth Circuit of the petition for a hearing *en banc* contended that Whiteside was not prejudiced by his counsel's threats. *Scurr*, 750 F.2d at 714-16.

16. *Nix*, 106 S. Ct. at 994.

17. *Strickland*, 466 U.S. at 688.

18. *Nix*, 106 S. Ct. at 994 (quoting *Strickland*, 466 U.S. at 688).

19. *Nix*, 106 S. Ct. at 994.

20. *Id.*

21. *Id.*

duct.”²² But, according to the Court, that inquiry was not necessary in *Nix v. Whiteside* “since virtually all of the sources speak with one voice.”²³ However, this is not the case. The sources do not speak with the one voice the Court assumed and Whiteside’s case raised the issues the Court saved for another day.

“Both the Model Code of Professional Conduct²⁴ and the Model Rules of Professional Conduct,”²⁵ Chief Justice Burger writes, “adopt the specific exception from the attorney-client privilege for disclosure of perjury that [the] client intends to commit *or has committed*.”²⁶ “Indeed,”²⁷ the majority opinion continues, “both the Model Code and the Model Rules do not merely *authorize* disclosure by counsel of client perjury; they *require* such disclosure.”²⁸ This may be true of the Model Rules, in a sense, but it is not true of the Model Code.

Disciplinary Rule (DR) 4-101(C)(3) of the Model Code, upon which the majority opinion relies, provides that a “lawyer may reveal . . . [t]he intention of his client to commit a crime [perjury] and the information necessary to prevent the crime.”²⁹ It does not except from the obligation of confidentiality the disclosure of a crime (perjury) that the client has already committed. In *Nix v. Whiteside*, it is clear Whiteside’s counsel did not threaten to disclose that Whiteside was intending to commit perjury, but threatened that if Whiteside committed perjury, counsel would seek to withdraw, advise the trial court of what Whiteside was doing and testify against him.³⁰

For its conclusion that the Model Code requires disclosure of client perjury, the majority opinion relies upon DR 7-102(B) of the Model Code, which provides:

A lawyer who receives information clearly establishing that: (1) his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected

22. *Id.*

23. *Id.*

24. *Id.* at 995. This is a slip. This codification of standards, originally adopted by the American Bar Association in 1969, is entitled “Model Code of Professional Responsibility.” It was subsequently adopted (in many cases with modifications) by nearly every state.

25. *Id.* This codification of standards was adopted by the American Bar Association in 1983. It has been adopted by 11 states but not by Iowa which adopted a form of the Model Code. See *id.* at 995 n.4.

26. *Nix*, 106 S. Ct. at 995 (emphasis added).

27. *Id.*

28. *Id.* (emphasis in original).

29. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(3) (1979). Perjury and the subornation of perjury are felonies in Iowa. IOWA CODE §§ 720.2, 720.3 (1985).

30. See *Nix*, 106 S. Ct. at 992, 1001; see *supra* text accompanying note 1.

person or tribunal, *except when the information is protected as a privileged communication.*³¹

The except clause takes us back to DR 4-101(C)(3) which states that a lawyer "may"³² — not must or shall — reveal "the intention of his client to commit a crime."³³

For its conclusion about the Model Rules the Court relies upon Rule 3.3. Model Rule 3.3(a)(4) provides that a lawyer "shall not knowingly: . . . offer evidence that the lawyer knows to be false"³⁴ and that if "a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."³⁵ Rule 3.3(b) provides that the duties stated in Rule 3.3(a) "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6,"³⁶ that is, secret or confidential information. The black letter of Rule 3.3(a)(4) does not define the "reasonable remedial measures"³⁷ that the lawyer must take if the client has committed perjury.

The Court cites the comments to Rule 3.3 dealing with the remedial measures that must be taken. The Court apparently relies on comments [5] and [6] for the proposition that the commentary "suggests that an attorney's revelation of his client's perjury to the court is a professionally responsible and acceptable response to the conduct of a client who has actually given perjured testimony."³⁸ But these comments relate only to civil cases. Comment [6] states that "[e]xcept in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party."³⁹

Comments [11] and [12] to Rule 3.3 deal specifically with perjury committed by a criminal defendant but they are not mentioned in the Court's opinion. Comment [11] states that if perjured testimony has been offered by a criminal defendant and the lawyer's "withdrawal will not remedy the situation or is impossible,"⁴⁰ the lawyer

31. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B) (1979) (emphasis added).

32. *Id.* DR 4-101(c)(3).

33. *Id.*

34. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1983).

35. *Id.*

36. *Id.* Rule 3.3(b).

37. *Id.* Rule 3.3(a)(4).

38. *Nix*, 106 S. Ct. at 996.

39. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment 6 (1983).

40. *Id.* comment 11.

“should make disclosure to the court”,⁴¹ — not to the trier of fact. “It is for the court then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.”⁴² The comment does not envisage the drastic step that Whiteside’s counsel threatened — to withdraw and take the stand as a witness for the prosecution in order to impeach his client’s testimony.

The notes on the scope of the Model Rules explain that some of the Rules “are imperatives, cast in the terms ‘shall’ or ‘shall not’ ”,⁴³ others, “generally cast in the term ‘may,’ are permissive and define areas under the Rules in which the lawyer has professional discretion.”⁴⁴ “No disciplinary action,”⁴⁵ we are told, “should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.”⁴⁶ Then, the notes continue, “[m]any of the Comments use the term ‘should.’ ”⁴⁷ But we are not enlightened about the precise significance of this usage. The notes also explain that the “Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”⁴⁸ Here the comments seem to limit the remedial measures the lawyer must take when perjured testimony has been offered by a client who is a criminal defendant. The intent to limit is underscored by comment [12] to Rule 3.3 that the “obligation of the advocate under these Rules”⁴⁹ in such a situation “may be qualified by”⁵⁰ and “is subordinate to”⁵¹ any “constitutional provisions for due process and the right to counsel in criminal cases.”⁵² In any case, taking an overview of Rule 3.3 and the comments appended to it, it is not reasonable to conclude that they obligate a lawyer to threaten to withdraw and testify, or otherwise disclose to the trier of fact, that the client, a criminal defendant, has committed perjury.

The Court mentions, in a footnote,⁵³ ABA Proposed Defense Function Standard 4-7.7,⁵⁴ which would allow counsel to permit the accused to testify falsely by a narrative without guidance through

41. *Id.*

42. *Id.*

43. MODEL RULES OF PROFESSIONAL CONDUCT Scope ¶ 1, at 71 (1983).

44. *Id.* at 71-72.

45. *Id.* at 72.

46. *Id.*

47. *Id.*

48. *Id.*

49. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment 12 (1983).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Nix*, 106 S. Ct. at 996 n.6.

54. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Proposed Defense Function Standard 4.7-7 (2d ed. 1980).

the lawyer's questioning but enjoin the lawyer not to "later argue the defendant's known false version of facts to the jury as worthy of belief,"⁵⁵ or "recite or rely upon the false testimony in his or her closing argument."⁵⁶ However, the Court correctly concludes that the "Rule [3.3] finally promulgated in the current Model Rules of Professional Conduct rejects any participation or passive role whatever by counsel in allowing perjury to be presented without challenge."⁵⁷ But this rejection does not justify the Court's reading of what Model Rule 3.3 either requires or permits.

Finally, in support of its conclusion, the Court cites *Committee on Professional Ethics and Conduct of Iowa State Bar Association v. Crary*.⁵⁸ Unfortunately, the case does not support its conclusion. Crary, the lawyer disbarred in that case, was in an adulterous relationship with a woman whom he represented, as associate counsel, in a divorce action she instituted. During the first day of the taking of her deposition by her husband's attorney, she lied about her whereabouts during a period of ten days when she was in fact living with Crary. Crary, of course, knew she was lying but did nothing to halt the false testimony or recess the deposition. Two days later, the deposition was continued and the client resumed her perjury. Again, the lawyer did nothing. Unknown to both, the husband had employed private investigators to observe his wife and so her true whereabouts during the period in question were known to the husband and his attorney. The wife's testimony was quickly demonstrated to be false and, after consulting his colleague, the attorney of record, Crary finally recessed the deposition and, together with the attorney of record, withdrew from the representation.

For knowingly permitting his client to commit perjury over a period of three days, Crary was found to have violated the Iowa Code which makes it the duty of an attorney to "employ for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judges by any artifice or false statement of fact or law."⁵⁹ For this misconduct, as well as misconduct in another respect not here pertinent, the lawyer was disbarred.

55. *Id.*

56. *Id.*

57. *Nix*, 106 S. Ct. at 996 n.6.

58. 245 N.W.2d 298 (Iowa 1976).

59. *Crary*, 245 N.W.2d at 304 (quoting IOWA CODE § 610.14(3)). The Iowa Supreme Court stated it was placing "the [Iowa] Code of Professional Responsibility aside as a basis for decision" because the Code was not in effect when the perjury occurred. *Id.*

In dealing with Crary's attorney-client privilege claim, the Iowa Supreme Court stated that he was confusing "the duty to divulge the truth after perjury is committed with the duty not to permit a witness to give false testimony in the first place."⁶⁰ It did not disbar the lawyer for his "failure to inform opposing counsel or the court of the truth,"⁶¹ but for failing to stop his client or otherwise to call a halt when she started to lie and continued to lie over a period of three days.⁶²

At one point, the Iowa Supreme Court stated that it was willing to consider the scope of the attorney-client privilege on the assumption that the lawyer's "breach was in not divulging the truth to opposing counsel or the court after the false testimony was given."⁶³ Even so, the court concludes, "no duty exists to the client when the client perjures himself to the knowledge of the attorney"⁶⁴ because "[s]uch conduct by the client falls outside the attorney-client relationship."⁶⁵ It is this unsupported dictum in a civil, not a criminal case, upon which the United States Supreme Court relies for its conclusion that a lawyer is required to disclose to the trier of fact that a client — a criminal defendant — has committed perjury.

Though the Court concludes in *Nix v. Whiteside* that the conduct of Whiteside's counsel was "wholly consistent with the Iowa standards of professional conduct and law,"⁶⁶ it does not mention the provisions of Iowa law which have the most direct bearing on the professional responsibility of Whiteside's counsel. Iowa did not adopt DR 7-102(B)(1) of the Model Code as written by the ABA.⁶⁷ Instead, it deleted the clause "except when the information is protected as a privileged communication"⁶⁸ and inserted "except when barred from doing so by Section 622.10, The Code."⁶⁹ Section 622.10 of the Iowa Code provides:

60. *Crary*, 245 N.W.2d at 306.

61. *Id.*

62. *Id.* at 305-06.

63. *Id.* at 306.

64. *Id.*

65. *Id.* The court cites Canon 15 of the ABA Canons of Professional Ethics (1957), which preceded the Model Code. This Canon states: "The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client." The court also cites DR 1-102(A)(4) and (5) and DR 7-102(A)(6) and (7) of the Iowa Code of Professional Responsibility for Lawyers. *Crary*, 245 N.W.2d at 307. Like Canon 15, these provisions do not speak specifically to the lawyer's obligation to divulge the truth to opposing counsel or the court *after* the client — a criminal defendant — has testified falsely.

66. *Nix*, 106 S. Ct. at 999.

67. *See supra* text accompanying note 31.

68. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1979).

69. IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS DR 7-102(B)(1) (1986).

No practicing attorney, counselor, . . . shall be allowed, *in giving testimony*, to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course or practice in the discipline.⁷⁰

It seems clear that Whiteside's counsel would have violated the Iowa Code by testifying against him while he was acting as Whiteside's counsel or even after he withdrew. Such an explicit prohibition against testimonial disclosure of confidential information strongly suggests that threatening testimonial disclosure is also prohibited and unethical under Iowa law. Surely the Court should have considered the implications of section 622.10 of the Iowa Code.

If Whiteside's counsel violated the Iowa Code, then the Court, for that reason alone, could not assume, as it did, that "virtually all of the sources speak with one voice"⁷¹ as to the conduct required of counsel in the circumstances faced by Whiteside's counsel. It would have had to confront the question of whether this particular breach of an ethical standard made out a denial of the sixth amendment guarantee of effective assistance of counsel. If it had decided this question in the negative, it would indeed have done what it cautioned courts not to do — "constitutionalize[d] particular standards of professional conduct and thereby intrude[d] into the State's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts."⁷² In other words, it would have decided that the *Strickland* test of what fell within or outside "the wide range of reasonable professional assistance"⁷³ would be given a national, uniform meaning for purposes of the sixth amendment and not depend upon the standards of professional conduct applicable in a particular jurisdiction.

The concurring opinions in the Supreme Court did not take issue with the majority's reading of the Model Code or the Model Rules. Nor did they mention section 622.10 of the Iowa Code, which might have supported their dissatisfaction with what Justice Blackmun described as "the Court's implicit adoption of a set of standards of professional responsibility for attorneys in state criminal proceedings."⁷⁴ Justice Brennan expressed the same dissatisfaction as follows:

70. IOWA CODE § 622.10 (1985) (emphasis added). The same prohibition applies to physicians, surgeons, ministers of the gospel and priests of any denomination.

71. *Nix*, 106 S. Ct. at 994.

72. *Id.*

73. *Strickland*, 668 U.S. at 689.

74. *Nix*, 106 S. Ct. at 1006.

Unfortunately, the Court seems unable to resist the temptation of sharing with the legal community its vision of ethical conduct. But let there be no mistake: the Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law. As Justice Blackmun observes, *that* issue is a thorny one, . . . but it is not an issue presented by this case. Lawyers, judges, bar associations, students and others should understand that the problem has not now been 'decided.'⁷⁵

This view of the majority opinion does not appreciate its significance fully, particularly if Whiteside's counsel is taken to have violated the ethical standard embodied in section 622.10 of the Iowa Code. One may agree with Justice Blackmun that "[w]hether an attorney's response to what he sees as a client's plan to commit perjury violates a defendant's Sixth Amendment rights may depend on many factors"⁷⁶ But certainly one of the factors under *Strickland* is whether counsel acted in accordance with the governing ethical standards, and the majority's holding that the conduct of Whiteside's counsel fell within the wide range of reasonable professional assistance had the force of law for purposes of the sixth amendment. Thus, the majority's "vision of ethical conduct" is imposed with more authority than Justice Brennan suggests.

Justices Brennan and Blackmun feared that the majority was nationalizing the governing ethical standards. They were apparently willing to have each state determine for its practitioners the ethical component of the "reasonable professional assistance" demanded by the sixth amendment.⁷⁷ On this view, it would be essential to know whether the lawyer acted in accordance with the ethical code in the jurisdiction in which he practices — unless, of course, conduct in accordance with that code violates constitutional requirements. The majority opinion recognized that "[u]nder the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel."⁷⁸ If, therefore, Whiteside's counsel had violated any provision of the Iowa Code of Professional Responsibility for Lawyers (which incorporates by reference section 622.10 of the Iowa Code), the Supreme Court could have held, nevertheless, that counsel had rendered reasonable professional assistance⁷⁹ under *Strickland*. But in doing so the Supreme Court would have nationalized the governing ethical stan-

75. *Id.* at 1000 (emphasis in original).

76. *Id.* at 1006 (Blackmun, J., concurring).

77. *Id.* Dissenting in *Strickland*, Justice Marshall complained that the Court did not decide whether "the standard of performance mandated by the Sixth Amendment [should] vary by locale . . . ,"⁷⁸ *Strickland*, 466 U.S. at 708 (Marshall, J., dissenting), and objected that the Court's performance standard "will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts." *Id.* at 707-08.

78. *Nix*, 106 S. Ct. at 994.

79. *Strickland*, 466 U.S. at 689.

dards and the concurring Justices' criticism of the majority opinion would have been validated. Yet neither Justice mentions the pertinent provision of the Iowa Code.

It is true that Iowa could have disciplined Whiteside's counsel for violating the Iowa Code, as interpreted by the Iowa Supreme Court, even though the United States Supreme Court found his conduct had not deprived his client of sixth amendment rights. But this would be unlikely. The greater likelihood is that the Iowa ethical standard violated by counsel would give way to the Supreme Court's view of what is "reasonable professional assistance,"⁸⁰ just as it would give way, most certainly, if discharge of an attorney's ethical obligation under a state code deprived the client of sixth amendment rights.⁸¹

The opinions in the Iowa Supreme Court and Eighth Circuit Court of Appeals were not helpful to the United States Supreme Court. Although the Iowa Supreme Court accepted as fact that Whiteside's counsel would not permit Whiteside to testify falsely and threatened, if he did so, to withdraw and advise the trial judge that his testimony was perjurious, it held that counsel's action was vindicated by DR 4-101(C)(3) of the Iowa Code of Professional Responsibility for Lawyers which permits a lawyer to reveal the "intention of his client to commit a crime and the information necessary to prevent the crime."⁸² But the issue under the Iowa Code was what the lawyer must or may do *after* his client has committed perjury.⁸³ The Iowa Supreme Court made no reference to DR 7-102(B)(1) of the Iowa Code of Professional Responsibility for Lawyers which incorporates by reference section 622.10 of the Iowa Code,⁸⁴ and thereby prohibits a lawyer from giving testimony disclosing confidential information.

Unlike the Iowa Supreme Court, the Eighth Circuit recognized

80. *Id.*

81. I recognize that the two situations may be distinguished. It would be intolerable to discipline a lawyer for conduct that is constitutionally required and comment [12] to Model Rule 3.3 recognizes this by stating that the "obligation of the advocate under these Rules is subordinate to . . . a constitutional requirement." But if Whiteside's counsel violated an Iowa ethical standard, he would not be disciplined for conducting himself as the Constitution required. Compliance with the Iowa ethical standard would not have rendered his assistance to Whiteside ineffective. Nevertheless, I stand by my prediction.

82. *State v. Whiteside*, 272 N.W.2d at 470-71 (quoting IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS DR 4-101(c)(3)).

83. See *supra* notes 66-70 and accompanying text.

84. The Iowa Supreme Court also relied on DR 7-102(A)(4) which prohibits a lawyer from knowingly using perjured testimony or false evidence. This provision, too, does not completely dispose of the issue raised by the conduct of Whiteside's counsel.

that it had to decide whether Whiteside was deprived of effective assistance of counsel because his counsel threatened that if Whiteside testified falsely he would seek to withdraw, advise the state trial judge that Whiteside's testimony was perjurious and testify against him.⁸⁵ Though *Strickland* had been decided before the panel's decision, the panel stated it would "not deal with the ethical problem inherent in [Whiteside's] claim,"⁸⁶ but only with the sixth amendment requirement of effective assistance of counsel. Nevertheless, following *Strickland*, it pointed out that in deciding what the sixth amendment requires, it was "at liberty to consider, purely as guidelines and not as governing rules, the views of authorities on legal ethics, including views set forth in various proposed standards and codes of professional conduct."⁸⁷ Indeed, it found that Whiteside had been deprived of the effective assistance of counsel because his "counsel's actions were inconsistent with"⁸⁸ basic ethical standards — "the obligations of confidentiality and zealous advocacy."⁸⁹

As its guidelines to what these obligations were, the Eighth Circuit panel relied on Professor Monroe Freedman's view⁹⁰ that the lawyer should handle the false testimony of his accused client as he handles truthful testimony and should be excused entirely from any duty to reveal the client's perjury. The panel did not mention that the Model Rules reject Professor Freedman's position because it

85. The majority opinion in *Nix* states that the Court of Appeals "determined that [counsel's] efforts to persuade Whiteside to testify truthfully constituted an impermissible threat to testify against his own client [but the Court] find[s] no support for a threat to testify against Whiteside while he was acting as counsel." *Nix*, 106 S. Ct. at 996-97 n.7 (emphasis added). Viewing the Eighth Circuit panel opinion as a whole, this is an unfair statement of its position. At one place in its opinion, the panel does refer to counsel's threat to testify against Whiteside, *Whiteside v. Scurr*, 744 F.2d at 1330; at another place it refers to "counsel's actions, in particular the threat to testify against" Whiteside. *Id.* at 1329 (emphasis added). These statements are preceded by six descriptions of counsel's actions as threats to seek to withdraw, advise the trial court about Whiteside's testimony and testify against him. *Id.* at 1326-29. In this context, the references to counsel's "threat to testify against" Whiteside cannot be taken to indicate that counsel was threatening to testify against Whiteside while he was acting as Whiteside's counsel. *Id.* at 1329.

The majority opinion added that the "record reflects testimony by [counsel] that he had admonished Whiteside that if he withdrew he 'probably would be allowed to attempt to impeach that particular testimony,' if Whiteside testified falsely." *Nix*, 106 S. Ct. at 998 n. 7. In light of counsel's own testimony, see *supra* text accompanying note 1, it is reasonable to regard this admonition as a threat to testify against Whiteside.

86. *Whiteside v. Scurr*, 744 F.2d at 1327.

87. *Id.* at 1330.

88. *Id.* at 1329.

89. *Id.* The panel also found that counsel's actions "impermissibly compromised [Whiteside's] right to testify in his own defense by conditioning continued representation by counsel and confidentiality upon [Whiteside's] restricted testimony." *Id.*

90. M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

"makes the advocate a knowing instrument of perjury."⁹¹

The panel also took as a guideline the ABA Proposed Defense Function Standard 4-7.7 and noted that "counsel here fell short"⁹² of that standard. But again, it failed to mention that the Model Rules also reject this standard.⁹³ Finally, it relied on Model Rule 3.3 which, it stated, did "not appear to sanction a threat by defense counsel actually to take the stand and to testify as a prosecution witness on rebuttal."⁹⁴ As we saw,⁹⁵ this is true, but not the whole story. Finally, though recognizing that whether Whiteside's counsel behaved in an ethical fashion was governed solely by the Iowa Code of Professional Responsibility for Lawyers,⁹⁶ the panel failed to mention the only pertinent provision of the Iowa Code, DR 7-102(B)(1), that might have supported its conclusion.⁹⁷

Judge Fagg's opinion dissenting from the denial by the Eighth Circuit of a rehearing *en banc* argued that the conduct of Whiteside's counsel was "beyond reproach"⁹⁸ and "professionally reasonable"⁹⁹ and so, for this reason alone, the *Strickland* test for ineffective assistance claims was not met. But in reaching his conclusion, Judge Fagg did not mention DR 7-102(B)(1) of the Iowa Code of Professional Responsibility for Lawyers, the Model Rules, or the ABA Proposed Defense Function Standard 4.7-7.

Chief Judge Lay's opinion concurring in the denial of a rehearing *en banc* was intended to reply to Judge Fagg's dissenting opinion.¹⁰⁰ He relied upon the ABA Proposed Defense Function Standard 4-7.7 for his conclusions that "[e]thical standards allow a lawyer to seek withdrawal when a client insists on giving testimony the lawyer knows to be perjurious,"¹⁰¹ but the lawyer should not advise the court of the reason for seeking to do so.¹⁰² Like the Eighth Circuit panel, he failed to mention that the Model Rules reject this proposed standard. Moreover, according to the Chief Judge, it is "uncontest-

91. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment 9 (1983).

92. *Whiteside v. Scurr*, 744 F.2d at 1330-31.

93. See *supra* text accompanying note 57.

94. *Whiteside v. Scurr*, 744 F.2d at 1331.

95. See *supra* notes 34-57 and accompanying text.

96. *Whiteside v. Scurr*, 744 F.2d at 1330.

97. See *supra* text accompanying note 84.

98. *Scurr*, 750 F.2d at 717.

99. *Id.* at 718.

100. See *id.* at 716-17.

101. *Id.* at 716.

102. *Id.* at 717.

able”¹⁰³ that “it is both unethical and a denial of effective assistance of counsel for an attorney to threaten to testify against the defendant client as to information given in confidence by the client.”¹⁰⁴ He did not say upon which code of ethical standards he was relying for this conclusion. He did not cite the Model Rules. Nor did he mention DR 7-102(B)(1) of the Iowa Code of Professional Responsibility for Lawyers which might have made his conclusion “uncontestable” at least in Iowa.

What are law clerks for?

103. *Id.*

104. *Id.*